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Cornelius J. Peck
University of Washington School of Law

WASHINGTON'S PARTIAL REJECTION AND MODIFICATION OF THE COMMON LAW RULE OF JOINT AND SEVERAL LIABILITY

Cornelius J. Peck*

Across the nation insurance companies and consumers of insurance have undertaken to dismantle a substantial portion of tort law developed by the judiciary. In 1986 they enjoyed considerable success in state legislatures[1] and continued to work at the federal level.[2] In Washington, those forces probably accomplished more of their program than in any other state.[3] The most important change made in Washington tort law is the partial but comprehensive rejection and modification of the common law rule that concurrent tortfeasors have a joint and several liability for the harm they have caused. The change has this significance because it will affect litigation, settlement of claims short of trial, and the process by which a tort victim goes about obtaining compensation for injuries suffered. It assures that in many situations tort victims will not receive full compensation for

*Professor of Law, University of Washington.

1. Wall St. J., Aug. 1, 1986, at 1, col. 6.

2. During the last year there was a sustained effort to obtain passage of the Products Liability Reform Act, S. 2760, 99th Cong., 2d Sess. (1986). The bill would have preempted state law, established an expedited settlement procedure with a $100,000 cap on dignitary losses. If a claimant rejected a settlement offer, liability for non-economic losses would be limited to $250,000. The bill was withdrawn from further consideration in the session on September 25, 1986. 132 CONG. REC. 13,709–11 (1986).

3. The statute, 1986 Wash. Laws ch. 305, altered the physician-patient privilege to the benefit of defendants, provided for review of the reasonableness of attorneys' fees, established a formula for capping non-economic damages within a range of $120,000 to $580,000, rejected and modified the common law rule of joint and several liability, established a statute of limitation for malpractice cases which may bar suits for injuries suffered by minors before they have reached majority, and established a procedure for structured awards or periodic payments of future economic damages in excess of $100,000. It also made a number of specific changes with respect to the concept that violation of a safety statute is negligence per se, liabilities to persons whose intoxication or use of drugs contributed to their injuries, and to persons who are killed while engaged in the commission of a felony. Surprisingly, the statute does not eliminate the collateral source rule in determining damages. Perhaps it was believed that an attempt to do so would have raised questions of whether this legislation was protective of the insurance industry rather than the public. The collateral source was noted as a possible subject for reform in a notebook distributed to all members of the Senate. *See, e.g.*, Trolin, *Controlling Liability Insurance Costs: State Action and Future Initiatives in the Area of Civil Justice Reform, reprinted in* NATIONAL CONFERENCE OF LEGISLATURES, RESOLVING THE LIABILITY INSURANCE CRISIS: STATE LEGISLATIVE ACTIVITIES IN 1986 (1986) [hereinafter NATIONAL CONFERENCE]; Proffer, *Tort Liability Litigation, reprinted in* NATIONAL CONFERENCE, *supra*, at 4.

those injuries judged either by the former standards for determining damages or even by the less generous standards established by the 1986 legislation.

The Washington Legislature acted largely in response to, and uncritically accepted, the proposals of an organization known as the Liability Reform Coalition. The coalition included insurance companies (including an insurance group set up by medical doctors in 1982) and insurance consumers, such as architects, engineers, dentists, truck drivers, and day care operators. Representatives of municipal and county governments were also prominent in the coalition's activities. Complaints that day-care nurseries could no longer continue to operate, that in rural counties all physicians were refusing to deliver babies, that trucking companies were shutting down for lack of insurance, that huge sums had been awarded for ridiculous product liability cases, and that lawyers were unconscionably pocketing enormous contingent fees persuaded legislators that something drastic had to be done. The persuasive power of the coalition was awesome, and its proposals moved through the legislative chambers, overcoming all obstacles with a force seldom, if ever, previously displayed in the Washington Legislature.[4]

The stated purpose of the legislation was to make insurance affordable and available.[5] This was to be accomplished by substantive changes in tort law that would reduce the losses experienced by insurance companies which had forced them to raise the rates for liability insurance.[6] It appears, however, that the chief cause of the insurance crisis (a sharp increase in premiums charged) was that in the late 1970s and early 1980s interest rates had risen to such a level that insurance companies wrote policies at rates lower than sufficient to cover predictable losses. They did so to obtain funds for investment at the then prevailing high interest rates. When interest rates dropped, the companies found themselves without sufficient reserves, an inadequate premium structure, and hence a need for drastic increases in premiums charged.[7] If one assumes that developments in tort law had in fact contributed the insurance crisis, it is most unlikely that a rule as old as the common law rule of joint and several liability could by itself have been a

4. *See* Tang, *The Insurance Crisis Induces a Legislative Panic*, The Weekly (Seattle), May 14–20, 1986, at 29, col. 1. Opponents made efforts to ameliorate the changes made by the coalition bill, presenting arguments against the proposed changes. On most issues there was no debate in either house. A spokesperson for the coalition stated no more than that a proposed amendment to the coalition's bill should be voted down and its amendment was rejected.

5. 1986 Wash. Laws ch. 305, §100.

6. *See, e.g.*, Trolin, *supra* note 3.

7. A REPORT TO THE LEGISLATURE FROM THE JOINT STUDY COMMITTEE ON INSURANCE AVAILABILITY AND AFFORDABILITY 2, 3, 8 (1985) (Dick Marquardt, Chairman) (on file at the University of Washington Law Library). A copy of the report was included in a notebook distributed to all members of the Senate.

cause of the crisis. If the rule played an operative role it would have to have been in conjunction with other recent changes in tort law.

In this discussion of the 1986 rejection and modification of the joint and several liability rule, an abbreviated account of that rule's operation prior to the statute's enactment is followed by an analysis of how the adoption of comparative negligence provided the basis for a successful attack on joint and several liability. Comparable developments in other states will be reviewed. Attention will then be given to the provision in the Washington statute which requires allocating fault to an "entity" even though that "entity" has not been, or cannot be, joined as a defendant, reducing the recoveries of plaintiffs who are not at fault in the slightest degree. Plaintiffs who are partially at fault may have to pursue several defendants to obtain compensation, and that compensation similarly be reduced by allocating fault to non-joined entities. Allocating fault to parents or spouses will produce what were probably uncontemplated results and complications. Negotiating settlements in tort cases will be drastically affected and involve parties who would not have been sued or retained in litigation under prior standards. The statute will encourage litigating third party tort claims of injured workers and result in a worsened experience rating for employers and higher losses for self insurers under workers compensation. The conclusion is that the statute requires redrafting and amendment even if its objectives remain acceptable after disclosing what must have been uncontemplated consequences.

I. COMMON LAW LIABILITY

A. Joint and Several Liability

There was, at common law, a joint liability of tortfeasors who acted in concert, or with a common purpose and design. Ordinarily, such torts were intentional torts, frequently criminal in nature, and involved some sort of combination or conspiracy.[8] Torts of that sort have had very little to do with the insurance crisis or a belief that tort law had become too expensive.

The joint and several liability of concurrent and successive tortfeasors finds more frequent application and hence is of greater importance to those undertaking a reform of tort law. Tortfeasors acting independently whose conduct concurred and caused an indivisible injury had a joint and several liability. The injury was considered indivisible because there was no basis for allocating responsibility on the basis of causation, and no other method of allocation appeared to be rational.[9] Each tortfeasor was in fact a cause of

8. W. PROSSER & P. KEETON, THE LAW OF TORTS § 46, at 322–24 (5th ed. 1984).
9. *Id.* at 345, 347.

the harm. Therefore, both or all of the concurrent tortfeasors were held liable for the entire harm done. The same reasoning applied to tortfeasors who had successively injured a plaintiff if there was no basis for allocating the harm done and the injuries were therefore considered indivisible. Doubts would not be resolved in favor of a wrongdoer. However, if a reasonable ground existed for identification of separate injuries or the portions of a single injury caused by tortfeasors, the damages would be considered capable of apportionment and the liability would not be joint.[10] On the other hand, where there were successive injuries capable of being apportioned but the first tortfeasor placed the plaintiff in the peril of the second injury, the first tortfeasor was held liable for all of the injuries because he had caused them.[11]

Although concurrent or successive tortfeasors had a joint and several liability to a party they had injured, that party was entitled only to compensation for the full amount of the harm suffered; double or multiple recoveries of damages were not permitted. The injured party was not, however, required to bring suit against all of the tortfeasors whose conduct was a cause of the injury, but might instead proceed against the tortfeasor who seemed most exposed to liability or most capable of responding to and satisfying a judgment.

The rule of joint and several liability developed when the common law rule was that contributory negligence on the part of a plaintiff was a complete bar to recovery. The slightest amount of fault on the part of the plaintiff created such a bar. Conceptually, the question was whether a totally innocent plaintiff should be permitted to recover the full amount of his or her damages from a wrongdoer whose conduct had concurred with that of another wrongdoer to produce a single and indivisible injury or causally unallocable harm. For most persons that question was easily answered in the affirmative. This was true even though there was a widespread belief that the governing rule, applied by jurors, lawyers settling cases, and insurance adjusters was a comparative negligence rule, by which a plaintiff's recovery was reduced in proportion to his or her degree of fault. Even judges gave tacit approval to the comparative rule by sending cases clearly involving contributory negligence to the jury.[12]

The rule of joint and several liability permitted a plaintiff to impose the entire burden of compensation upon one of a number of tortfeasors. This occurred with some frequency because, as mentioned above, the plaintiff would elect to obtain satisfaction of judgment from the tortfeasor with the

10. *Id.* at 348–49.

11. *Id.* at 352.

12 *Id.* at 455–56; V. SCHWARTZ, COMPARATIVE NEGLIGENCE 6–7 (2d ed. 1986); Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 MICH. L. REV. 689, 727 (1960).

greatest financial ability to respond, avoiding the difficulties of collection which might be encountered in pursuing other of the jointly and severally liable tortfeasors. At the common law, contribution was not allowed between joint tortfeasors even though they had not acted in concert or with the intention of injuring the plaintiff. The denial of contribution between tortfeasors was subjected to substantial criticism, and in the last fifty years most states adopted statutes which permitted contribution in one form or another.[13] The right to contribution was established in Washington in 1981 by statute.[14] The basis for contribution between tortfeasors in Washington was their comparative fault.

B. The Impact of Comparative Negligence

The common law rule that contributory negligence was a complete bar to recovery was likewise subjected to severe criticism. That rule has now been replaced in a majority of jurisdictions by a comparative negligence rule. Comparative negligence has been adopted in various formulations, all of which permit a plaintiff partially at fault to recover damages, appropriately reduced in proportion to the plaintiff's fault. In Washington, comparative negligence was adopted in 1973.[15] The Washington Legislature adopted the "pure" form of comparative negligence, which permits a plaintiff to recover some damages even though his fault is greater than that of the defendant or defendants from whom recovery is sought. Other forms of comparative negligence permit recovery only when the plaintiff's fault is less than, or not greater than, the fault of the defendant or defendants.[16]

The major purpose of adopting a comparative negligence rule was to avoid the harshness of the contributory negligence rule, which, if strictly applied by the trier of fact, completely barred any recovery by an injured party if that party was in any respect responsible for the accident which caused the injuries. The adoption may be viewed as a change of law made to facilitate recoveries by injured parties, thereby serving the compensatory function of tort law. Fairly soon after the legislature adopted comparative negligence it was argued that the adoption should result in abandonment of the rule of joint and several liability. The Washington Supreme Court rejected the argument, refusing to complicate the problems of plaintiffs in obtaining full recovery of damages.[17] The court would not allow the

13. W. PROSSER & P. KEETON, *supra* note 8, at 338.

14. 1981 Wash. Laws ch. 27, §§ 12–14, codified at WASH. REV. CODE §§ 4.22.040–.060 (1987).

15. 1973 Wash. Laws, 1st Ex. Sess., ch. 138, codified at WASH. REV. CODE §§ 4.22.005–.015 (1987).

16. V. SCHWARTZ, *supra* note 12, at 45–76.

17. Seattle First Nat'l Bank v. Shoreline Concrete Co., 91 Wn. 2d 230, 236, 588 P.2d 1308 (1978).

compensatory function of the law of torts to be compromised by a change in law designed to support that function.

Ironically, it has nevertheless been the adoption of comparative negligence which provided the arguments which persuaded the legislature to partially reject and modify the common law rule of joint and several liability for concurrent tortfeasors. In many cases a plaintiff not at fault—guilty of no contributory negligence—will be worse off than under the contributory negligence rule. Indeed, as mentioned above, the rejection of joint and several liability assures that in a number of situations an injured party will be unable to obtain full compensation for harm caused by several tortfeasors.

The basic argument for abandoning the rule of joint and several liability is that if a plaintiff may recover despite fault, suffering only a diminishment of recovery in proportion to that fault, it is unjust to impose on a tortfeasor a liability greater than the proportionate fault of the tortfeasor whose wrongdoing combined with the conduct of the plaintiff and other parties to cause the harm. In other words, responsibility for harm done should be distributed in proportion to the fault of all of the parties involved and not governed by concepts of causation.

The argument against joint and several liability is reinforced under a comparative negligence rule when the entire liability for harm caused is imposed upon a tortfeasor whose financial responsibility and ability to pay makes it an ideal or target defendant even though its proportionate fault may be much less than that of other tortfeasors who also caused the harm. For example, it has become quite common in automobile accident litigation in which the damages will exceed the policy limits of the drivers involved to charge the government responsible for the roadway—municipality, county, or state—with fault in the design or maintenance of the roadway. If the governmental body is found to have been at fault, under joint and several liability it will be liable for all of the damages suffered by the plaintiff even though its proportionate fault might be assessed at as little as ten percent or less. For example, an intoxicated or careless driver permits his vehicle to cross the traffic lane divider, causing a head-on collision and multiple deaths. It is charged that proper design required a physical barrier to separate the lanes of traffic, or that it was negligent to use a reversible lane without more adequate warnings.[18] The argument against joint and several liability becomes even stronger if full recovery is permitted from such a target defendant by a plaintiff whose proportionate fault was greater than the fault of the target defendant.

18. *See* Vasey v. Snohomish County, 44 Wn. App. 83, 721 P.2d 524 (1986) (county 20% liable to wife of driver whose negligence was 80% of the total negligence).

The Supreme Court of California was presented with these arguments in a case challenging the validity of the rule of joint and several liability when comparative negligence governs the right of a plaintiff to recover.[19] The court found the arguments to be unpersuasive. The court pointed out that abandonment of the rule would affect the rights of plaintiffs who had not been contributorily negligent. Even negligent plaintiffs were not wrongdoers as were the defendant tortfeasors. A negligent plaintiff was guilty only of a failure to use due care with respect to himself rather than a lack of care with respect to others. Moreover, a harm caused by several concurrent tortfeasors remained an indivisible harm of which each was a cause; each had caused the entire harm and not merely a portion of it.

The California Supreme Court's views were not persuasive in the Washington Legislature. The sympathy of the legislators apparently shifted to defendants who might be held liable for more than their share of the damages apportioned on the basis of fault. The legislator's concern was not met by observing that Washington law permitted contribution between tortfeasors on the basis of comparative fault.[20] When contribution is permitted, the question becomes one of whether the defendant from whom the plaintiff receives payment should have the burden of attaching liability to other tortfeasors, and bearing the risk that insolvency or unavailability will preclude recovery from other wrongdoers. The legislative decision was that, in Washington, that burden and that risk should rest on a plaintiff who is at fault in any degree.

II. DEVELOPMENTS IN OTHER STATES

The arguments against joint and several liability have found support not only in Washington. Changes in the rule were made in at least twelve other states during 1986.[21] Changes had been made in other states at earlier dates. Thus joint and several liability has been totally abolished in

19. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978). The analysis of the Supreme Court of California was accepted by the Supreme Court of Washington in Seattle First National Bank v. Shorline Concrete Co., 91 Wn. 2d 230, 237 (1978).

20. WASH. REV. CODE § 4.22.040(1) (1986).

21. Wall St. J., August 1, 1986, at 1, col. 6.

Colorado,[22] Indiana,[23] New Hampshire,[24] New Mexico,[25] Ohio,[26] Oklahoma,[27] Wyoming,[28] and Utah.[29] It was abolished in Connecticut with an exception permitting reallocation of liability on the plaintiff's motion if within one year the court determines that a defendant's allocated share of liability is uncollectible.[30] Joint and several liability was abolished for cases in which the defendant was less than twenty-five percent at fault in Illinois.[31] A similar limitation on recovery of non-economic damages was made in Hawaii.[32] In West Virginia, joint and several liability has been abolished in suits against municipalities and political subdivisions for defendants who bear less than twenty-five percent of the negligence attributable to all defendants.[33] In Michigan, joint and several liability was eliminated with exceptions preserving it for cases in which the plaintiff is not at fault and products liability cases.[34] In Alaska joint and several liability was preserved with an exception that a party who is allocated less than fifty percent of the total fault may not be jointly and severally liable for more than twice that percentage of fault.[35] Joint and several liability for

22. COLO. REV. STAT. §13.211.5 (1986), *amended by* 1986 Colo. Sess. Laws chs. 107, 108.

23. IND. CODE ANN. § 34-4-33-5(b) (Burns 1986), *amended by* P.L. 317-1983, 5 sec. 1, P.L. 174-1984, sec. 3 (effective January 1, 1985).

24. N.H. REV. STAT. ANN. § 507:7-a (1983 & Supp. 1986). In New Hampshire joint and several liability remains the rule except when a judgment is entered against two or more defendants. Thus, where a plaintiff settled with one defendant before trial and then sued another the court held that the remaining defendant was not entitled to implead the settling defendant for the purpose of obtaining an apportionment of damages. Minoy v. Proulz, 113 N.H. 698, 313 A.2d. 723 (1973).

25. In Scott v. Rizzo, 96 N.M. 682, 694 P.2d 1234 (1981), the Supreme Court of New Mexico judicially adopted a system of pure comparative negligence. In Bartlett v. New Mexico Welding Supply, 98 N.M. 152, 646 P.2d 579, *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982), the New Mexico Court of Appeals reached the conclusion that legislative adoption of comparative negligence required the abandonment of the common law rule of joint and several liability. In Tipton v. Texaco, Inc., 103 N.M. 689, 712 P.2d 1351 (1985), the Supreme Court of New Mexico apparently gave its approval to the decision of the court of appeals in *Bartlett*, holding that third party practice was preserved despite the absence of joint and several liability of tortfeasors.

26. OHIO REV. CODE ANN. § 2315.19(2) (Page 1981 & Supp. 1985). The percentages of liability of the defendants is, however, determined on the basis of the fault of persons from whom recovery is sought.

27. Joint and several liability was abolished judicially in Oklahoma on the basis that it was not consistent with the adoption of a comparative negligence statute. Laubach v. Morgan, 588 P.2d 1071 (Okla. 1978).

28. 1986 Wyo. Sess. Laws ch. 24.

29. UTAH CODE ANN. § 78-27-38 (1953), *amended by* 1986 Utah Laws S.B. 64, § 2.

30. 1986 Conn. Legis. Serv. Pub. Act. 86-338 § 3(c) (West).

31. 1986 Ill. Legis Serv. P.A. 84-1431, art. 5 (West) (adding § 2-1117 to the Illinois Practice Code). Joint and several liability is preserved for all past and future medical expenses.

32. HAWAII REV. STAT. § 663(3) (1968), *amended by* 1986 Hawaii Sess. Laws, 1st Spec. Sess. 1986 S.B. No. 51-86, § 17.

33. W. VA. CODE § 29-12A-7 (1986), *amended by* 1986 W. Va. Acts, 1st Ex. Sess., ch. 24.

34. MICH. COMP. LAWS § 6304 (1970), *amended by* 1986 Mich. Legis. Serv. P.A. 178 (West).

35. ALASKA STAT. § 09.17.080(d) (1983 & Supp. 1986), *amended by* 1986 Alaska Sess. Laws ch. 139.

non-economic damages was abolished in California.[36] Joint and several liability for non-economic damages was limited in New York to cases in which the defendant was more than fifty percent at fault.[37] In Florida, joint and several liability was abolished for non-economic damages and retained for economic loss only where defendant's fault equals or exceeds that of the plaintiff.[38]

Other formulations of rejection of joint and several liability have been adopted. In Iowa, joint and several liability has been eliminated for defendants with less than fifty percent of the total fault.[39] In Louisiana,[40] Nevada,[41] and Texas[42] joint and several liability has been eliminated when the defendant's fault is less than the plaintiff's. A similar though lesser limitation upon joint and several liability is created by comparative negligence laws which permit recovery only against a defendant or group of defendants whose fault exceeds or equals that of the plaintiff. Such a limitation exists in Hawaii,[43] Pennsylvania,[44] and Minnesota.[45]

In most of the states abolishing joint and several liability, the total liability is divided among the parties to the lawsuit, resulting in a sharing between the named defendants of the plaintiff's damages, less the allocation, if any, to the plaintiff because of the plaintiff's fault. The departure from joint and several liability has much more severe consequences for a plaintiff under the Washington statute. The Washington statute not only permits allocation of fault to entities which have an immunity but also to entities which have not been joined as parties to the lawsuit.[46] A defendant's liability is therefore limited to his or its share of the total fault, the total including the fault of entities which are not parties to the lawsuit. That

36. Proposition 51, 1986 Cal. Legis. Serv. xxxi (West).

37. N.Y. CIV. PRAC. LAW § 1601 (McKinney 1976 & Supp. 1987), *amended by* 1986 N.Y. Laws ch. 682, § 16.

38. FLA. STAT. § 768.81(3) (1986), *amended by* 1986 Fla. Laws ch. 86-160.

39. IOWA CODE ANN. § 668.4 (West 1950 & Supp. 1987), *amended by* 1984 Iowa Acts ch. 1293, § 4.

40. LA. CIV. CODE ANN. art. 2324 (West 1961 & Supp. 1987), *amended by* 1980 La. Acts No. 431, § 1 (effective August 1, 1980).

41. NEV. REV. STAT. § 41.191(3) (1967 & Supp. 1986).

42. TEX. CIV. CODE ANN. § 33.013 (Vernon 1986), *amended by* 1985 Tex. Sess. Law Serv. 7106 (Vernon).

43. HAWAII REV. STAT. § 663-31 (1986).

44. PA. CONS. STAT. ANN. § 7102 (Purdon 1975 & Supp. 1986). Joint and several liability is preserved against any defendant against whom plaintiff's claim is not barred.

45. MINN. STAT. ANN. § 604.01 (West 1947 & Supp. 1987). In Minnesota a plaintiff's claim was not barred after 1978 if plaintiff's fault was not greater than that of the defendant. Prior to that date a plaintiff's fault had to be less than that of a defendant to permit recovery under the Minnesota comparative negligence statute. *See* Marier v. Memorial Rescue Serv., Inc., 196 Minn. 242, 207 N.W. 2d 706 (1973).

46. 1986 Wash. Laws ch. 305, § 401(1). The statute directs the trier of fact to determine the percentage of total fault attributable to "every entity" which caused a plaintiff's damage.

share may be considerably less than what it would have been if plaintiffs damages were shared between the defendants who were parties in the lawsuit.

The Colorado statute does expressly permit assignment of fault to a non-party, but limits that assignment to cases in which the defending party gives notice that a non-party was wholly or partially at fault within ninety days following commencement of an action. The notice is required to set forth the non-party's name and last known address, or the best identification of such non-party as is possible under the circumstances.[47] The Indiana statute permits a defendant to assert as a defense that the plaintiff's damages were caused in full or in part by a non-party, bearing the burden of proof of that defense, provided the assertion is made as part of an answer filed more than forty-five days prior to the running of the statute of limitations on a claim against that non-party.[48] The Supreme Court of Oklahoma has held that the negligence of tortfeasors who are not parties to the lawsuit—"ghost tortfeasors"—should be considered by the jury to make a proper apportionment of the negligence of the parties.[49] A similar conclusion was reached by the Court of Appeals of New Mexico in permitting the assignment of seventy percent of the fault of an automobile accident to a "phantom car" which left the scene without identification.[50]

III. THE WASHINGTON STATUTE

Section 401 of the 1986 Act is the provision rejecting and modifying the common law rule of joint and several liability. It reads as follows:

> NEW SECTION. Sec. 401. A new section is added to chapter 4.22 RCW to read as follows:
>
> (1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages, including the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities immune from liability to the claimant and entities with any other individual defense against the claimant. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the

47. COLO. REV. STAT. § 13.21.111.5(3) (1986).

48. IND. CODE ANN. § 34-4-33-10 (Burns 1986).

49. Gaither *ex rel.* Chalfin v. City of Tulsa, 664 P.2d 1026 (Okla. 1983); *see also* Paul v. N.L. Indus., Inc., 624 P.2d 68 (Okla. 1981).

50. Bartlett v. New Mexico Welding Supply, 98 N.M. 152, 646 P.2d 579 (1982).

claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:

(a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.

(b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [sic] total damages.

(2) If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060.

(3)(a) Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites.

(b) Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations.

(c) Nothing in this section shall affect any cause of action arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.

A. Allocation to "Entities"

Despite the importance of what is an "entity" in this section of the 1986 Tort Reform Act, the statute does not contain a definition of "entity." It is apparent from the words used that the term means more than defendant and also more than potential defendants with a defense to liability to the plaintiff. It will include employers with an immunity from suit by injured employees, parents with a defense to suit by children, spouses, and unidentified persons, bodies, and associations. Apparently, although the lack of a definition makes it less than certain, an "entity" must be a juridicial being capable of fault, and does not include inanimate objects or forces of nature.

Section 401(b) of the Washington statute preserves joint and several liability in those cases in which a plaintiff is not at fault, but that liability is limited to the sum of the proportionate shares of fault of the defendants against whom judgment is entered. It does not include the fault of a defendant or entity released by a plaintiff. Joint and several liability is abolished if a plaintiff is at fault, and apparently any fault is sufficient to

deprive the plaintiff of the benefit of the limited joint and several liability preserved under the Act. Defendants will not be liable for damages allocable to the fault of "entities" dismissed from the suit because of an immunity or the fault of an "entity" which was not or could not be joined as a defendant in the proceeding.[51] Nor, pursuant to express statutory provision, will defendants against whom a judgment has been entered be liable for any share of the fault and damages allocable to a defendant who prevailed on any individual defense. The provision for allocation of fault to "entities" will have results which may not have been anticipated by legislators and sponsors of the legislation.

A major concern of the proponents of the 1986 Act was to reduce the liabilities of third parties whose conduct tortiously injured an employee in the course of his employment. The typical case is one in which it is alleged that the machinery or other equipment used by the employee at the time of the injury was defective in some respect. Under the Washington workers' compensation law, the employer, even though also at fault in causing the employee's injury, has an immunity from tort liability to the employee.[52] Workers' compensation benefits frequently fail to give an injured employee full compensation for the injury suffered. Consequently, the employee brings a "third-party tort action" against the machinery or equipment manufacturer. The amount recoverable by the employee in that lawsuit may substantially exceed the worker's compensation benefits because the third-party tort action permits full recovery for a loss of earning capacity and recovery for non-economic losses, such as pain and suffering. Third-party defendants held liable to the employee previously sought to shift part of that liability to the employer, but the employer's immunity from liability to the employee was held to insulate the employer from a claim for indemnity or contribution by the manufacturer.[53] The 1986 Act changed that situation by providing that a share of fault may be allocated to an "entity" even though

51. An argument that an allocation of fault cannot be made to a non-party could be made from the last paragraph of RCW § 4.22.015, which provides what is apparently the definition of fault for the purposes of the 1986 statute. That paragraph, which predates the 1986 statute, reads: "A comparison of fault for any purpose under RCW 4.22.005 through 4.22.060 shall involve consideration of both the nature of *the conduct of the parties to the action* and the extent of the causal relation between such conduct and the damages." WASH. REV. CODE § 4.22.015 (1986) (emphasis added).

The argument is overidden by the express language of § 401 which requires the trier of fact to determine the percentage of the total fault which is attributable to every entity which caused the plaintiff's damages and to enter judgment against each defendant for that party's proportionate share of the plaintiff's total damages.

52. WASH. REV. CODE § 51.04.010 (1985).

53. Seattle First Nat'l Bank v. Shoreline Concrete Co., 91 Wn. 2d 230, 588 P.2d 1308 (1978). Nor did the negligence of the employer reduce the amount of the lien of the Department of Labor and Industries or a self-insurer on the claim of the employee against the third party defendant. Kelley v. Howard S. Wright Constr. Co., 90 Wn. 2d 323, 582 P.2d 500 (1978).

that "entity" was immune from liability to a plaintiff. The consequence was to reduce the liability of the manufacturer and, of course, the recovery by the injured worker.

Although the primary purpose of the provision permitting allocation of fault to an entity with immunity was to provide relief for defendants in workers' compensation third party tort actions, the provision was not limited in its application to those cases. It will instead be applicable to any other "entity" which has an immunity from tort liability to the plaintiff. Parents, for example, have a general immunity from liability to their children for failure properly to instruct them and supervise their activities.[54] Nevertheless, recently in suits brought for injuries suffered by minors, defendants have unsuccessfully attempted, relying upon the comparative negligence law, to obtain contribution or indemnity from the parents[55] or otherwise limit their liability to the child.[56] It may therefore be expected that in future suits brought by minors for injuries suffered, defendants will attempt to allocate fault to their parents despite the parental immunity because such an allocation will reduce the defendants' liability to a minor by the share of the minor's total damages allocated to the parent. This could occur even in cases in which the minor is totally without fault unless the parents are joined as defendants because the joint and several liability in such a case is limited to the sum of the proportionate shares of the defendants against whom judgment is entered.

In cases in which the minor is without fault parents may be sued with an understanding that they will not plead their immunity. Not pleading immunity would, of course, permit a judgment for a larger amount against the other defendants. In that event, the defendants should not be able to have the parents dismissed from the suit on jurisdictional grounds because of their immunity, but it will probably be argued that a defendant's statutory right to name other entities for the purpose of limiting liability created a substantive right to have the parents dismissed from the suit prior to the entry of judgment. If the parents are not dismissed, the prior case law

54. Baughn v. Honda Motor Co., 105 Wn. 2d 118, 712 P.2d 293 (1986); Talarico v. Foremost Ins. Co., 105 Wn. 2d 114, 712 P.2d 294 (1986); Jenkins v. Snohomish County Pub. Util. Dist. 1, 105 Wn. 2d 99, 713 P.2d 79 (1986); Chuth v. George, 43 Wn. App. 640, 719 P.2d 562 (1986). As stated in these cases, parents do have a tort liability to their children for wanton and willful misconduct, and it has been held that a child may recover from his parent for injuries caused by the parent's negligent driving. Merrick v. Sutterlin, 93 Wn. 2d 411, 610 P.2d 891 (1980); *see also* Note, *Torts—Parental Immunity*, 56 WASH. L. REV. 319 (1981).

55. Baughn v. Honda Motor Co., 105 Wn. 2d 119, 712 P.2d 293 (1986). A similar attempt produced the decision of the California Supreme Court in American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978), in which the court held that joint and several liability was neither abolished nor limited by its earlier decision to adopt a pure comparative negligence rule. *See supra* note 19.

56. *Jenkins*, 105 Wn. 2d at 103–06, 713 P.2d at 82–84.

establishes that the paying defendant will not be entitled to contribution from the parents.[57]

If allocations of fault to parents reduce the recoveries obtained by minors, the consequences will be different only in degree from those under the "barbarous rule"[58] of the common law by which the negligence of the parents was imputed to a child for the purpose of barring recovery under the contributory negligence rule. That rule was rejected by the Washington court long ago when the court stated that both the ethical basis for imputing negligence and sound authority sustained the view that the parent's negligence was not a defense to an action by a child for injuries suffered.[59] These consequences would also conflict with a statutory prohibition, to be discussed, against imputing the parent's negligence to a child.

The provision in section 401(1) for allocation of fault to an "entity" will permit a similar reduction in the recovery of an injured person if his or her spouse was one of the causes of the injuries. A spouse will be an "entity" to whom a share of fault in causing the accident can be allocated, and such an allocation will reduce the liability allocated to named defendants. There is no longer a general inter-spousal immunity from tort liability,[60] but spouses ordinarily do not sue one another unless there is insurance which will cover the defendant spouse. If the injured spouse was in any respect negligent (as might be expected, for example, with respect to accidents in the home by "do-it-yourself" couples working on a project) the loss to the family unit of attributing fault to the other spouse will be proportionately the same as if the negligence of that other spouse had been imputed to the injured spouse. Thus if the uninjured spouse was responsible for thirty or forty percent of the total fault, the liability of the other defendants will be reduced by thirty or forty percent.

That this result is predictable under the 1986 Act is surprising in light of recent legislative actions ensuring that the negligence of one spouse is not imputed to the other spouse. A rule requiring imputation had been judicially adopted at an early date because of a concern that under Washington community property law a negligent spouse might benefit from his or her own wrongdoing through a recovery by the community.[61] In 1973 the legislature included in the comparative negligence act a provision stating:

57. *See supra* note 54.

58. W. PROSSER & P. KEETON, *supra* note 8, at 531–32.

59. Gregg v. King County, 80 Wash. 196, 204, 141 P. 340, 344 (1914).

60. Freehe v. Freehe, 81 Wn. 2d 183, 500 P.2d 771 (1972). A plaintiff spouse may recover from the other all damages as separate property except for one half of the damages for lost earning capacity. *See* Vasey v. Snohomish County, 44 Wn. App. 83, 92–93, 721 P.2d 524, 529 (1986).

61. Ostheller v. Spokane & Inland E. R.R., 107 Wash. 678, 102 P.2d 630 (1919). It had earlier been held that a recovery by an injured spouse was community property. Hawkins v. Front-St. Cable Ry., 3 Wash. 592, 28 P. 1021 (1892).

> The negligence of one marital spouse shall not be imputed to the other spouse to the marriage so as to bar recovery in an action by the other spouse to the marriage, or his or her legal representative, to recover damages from a third party caused by negligence resulting in death or injury to the person.[62]

In 1981 the Legislature enacted a tort reform act which rephrased the provision to read:

> The contributory fault of one spouse shall not be imputed to the other spouse or the minor child of the spouse to diminish recovery in an action by the other spouse or the minor child of the spouse, or his or her legal representative, to recover damages caused by the fault resulting in death or in injury to the person or property, whether separate or community, of the spouse. In an action brought for wrongful death, the contributory fault of the decedent shall be imputed to the claimant in that action.[63]

The effect of these statutes upon a spouse's right to recover damages has not been established by the supreme court. The court of appeals has ruled that the prohibition against imputing negligence of one spouse to the other requires that a wife's claim for loss of consortium not be reduced because of her husband's contributory negligence in causing the accident which resulted in his incapacity.[64] The loss of consortium claim was viewed as separate and not derivative from any claim her husband might have had. The supreme court has characterized damages for pain and suffering as the separate property of an injured spouse,[65] from which it follows that negligence of the other spouse should not be imputed to reduce damages for pain and suffering.[66] These claims could be reduced, however, as indicated above, by an allocation of fault to the other spouse if the liability of the defendants is several and not joint. What effect the 1986 statute will have on other elements of an injured spouse's claim for damages would appear to turn upon whether those elements are viewed as community or separate. If they are viewed as community property the fault of one spouse traditionally would have worked a reduction in the amount recoverable.

The supreme court recently indicated that damages for loss of past earnings and for loss of future earning capacity will ordinarily be community property.[67] However, in an earlier decision in which the court abolished interspousal immunity from tort liability[68] the court held that an injured spouse was entitled to recover one half of his or her lost earning

62. 1973 Wash. Laws, 1st Ex. Sess., ch. 138, § 2.
63. 1981 Wash. Laws ch. 27, § 10 (codified at WASH. REV. CODE § 4.22.020 (1986)).
64. Christie v. Maxwell, 40 Wn. App. 40, 696 P.2d 1256 (1985).
65. Marriage of Brown, 100 Wn. 2d 729, 675 P.2d 1207 (1984).
66. *Cf.* Vasey v. Snohomish County, 44 Wn. App. 83, 721 P.2d 524 (1986).
67. *Brown*, 100 Wn. 2d at 729, 675 P.2d at 1207.
68. Freehe v. Freehe, 81 Wn. 2d 183, 500 P.2d 771 (1972).

capacity from the other spouse as separate property. In addition, the community was entitled to recover past and future medical expenses because that recovery would inure directly to the benefit of the injured spouse. This decision recently led the court of appeals to conclude, in a case arising before the effective date of the 1986 Act, that the statute prohibiting imputing negligence between spouses requires that an injured spouse be entitled to recover one half of the damages for lost earning capacity as separate property. That recovery will not be diminished because the other spouse's negligence contributed to the injuries.[69] Damages for the other half of the lost earning capacity was allocated to the other spouse and reduced by the negligence of that spouse.[70] The court of appeals, following the lead of the supreme court, also held that there was to be a full recovery of past and future medical expenses despite the fault of the uninjured spouse because those damages would inure to the benefit of the injured spouse.

These developments with respect to the prohibition of imputing fault between spouses and community property suggest interesting possibilities under the 1986 statute for those cases in which the injured spouse is free from fault but the other spouse was at fault. The illustrative case is one in which the injured spouse was a passenger in an automobile which collided with another through the combined negligence of the other driver and the driver-spouse. If a plaintiff is free from fault, liability of the defendants is joint and several for the sum of their proportionate shares of a plaintiff's total damages. It may, therefore, be advantageous for the injured spouse to file suit against the negligent spouse as well as the other driver for the purpose of including the share of the damages of the negligent spouse in the total for which there is a joint and several liability. Indeed, to do so would make an even stronger case that the injured spouse was entitled to recover damages for one-half of the lost earning capacity as separate property because that would be the relief to which the injured spouse was entitled in the action against the spouse at fault. Joining the spouse at fault would also preclude reducing the damages recoverable as separate property for pain and suffering or loss of consortium which would result from allocating a share of those damages to the spouse at fault if that spouse were not a party to the suit. The injured spouse need not seek satisfaction of the judgment from his or her spouse but may instead proceed to obtain that satisfaction from some other defendant.

Of course, if the injured spouse does obtain satisfaction from a defendant other than the spouse at fault, the couple must consider the possibility that the satisfying defendant will seek contribution from the spouse at fault, as

69. *Vasey*, 44 Wn. App. at 83, 721 P.2d at 524.
70. *Id.* at 94–95, 721 P.2d at 530.

the satisfying defendant is entitled to do under the 1986 statute.[71] If the couple has substantial community assets the amount lost in paying contribution may equal the gain from avoiding the diminution of an allocation of fault to the spouse as a non-joined entity. But if the couple does not have substantial community assets, and if the recovery by the injured spouse is characterized as separate property in accordance with the court of appeals' recent decision, the couple will have much to gain from a suit which includes the spouse at fault as a defendant. The other defendant will not be able to recover contribution from that part of the recovery obtained by the injured spouse as separate property, and the negligent spouse may free future earnings by obtaining a discharge in bankruptcy.

B. Successive Tortfeasors

It appears that another uncontemplated change has been made by section 401(1) for cases involving aggravation of injuries by a subsequent tortfeasor. Subsection 401(1)(a) provides:

> (a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.

The subsection appears to be the complete statement of when a party is responsible for the fault of another, and it does not include liability for successive injuries. For example, prior to the statute's effective date, a party who had wrongfully injured a plaintiff and thereby required medical treatment or hospitalization was liable for the aggravation of the plaintiff's injuries through the malpractice of a physician or hospital personnel.[72] A party who tortiously injured another and left that person in a position of peril would be held liable for the aggravation of that person's injuries in a subsequent accident even though that accident came about because of the negligence of a third person.[73] That liability did not rest upon the concept of joint and several liability for harms which cannot be segregated but instead upon principles of causation. Read literally, section 401(1) would require determining the proportionate share of total fault for each of the successive

71. 1986 Wash. Laws ch. 305, § 401(2).

72. Yarrough v. Hines, 112 Wash. 310, 192 P. 886 (1920); *see* Martin v. Cunningham, 93 Wash. 517, 161 P. 355 (1916); W. PROSSER & P. KEETON, *supra* note 8, at 309; RESTATEMENT (SECOND) OF TORTS § 879 illustration 3 (1979); *see also* Atherton v. Devine, 602 P.2d 634 (Okla. 1979) (holding the original tortfeasor liable for the aggravation of injuries which occurred when the ambulance transporting the plaintiff to a hospital was involved in another accident).

73. RESTATEMENT (SECOND) OF TORTS § 879 (1979); W. PROSSER & P. KEETON, *supra* note 8, at 329; *cf.* Fugere v. Pierce, 5 Wn. App. 592, 490 P.2d 132 (1971). *But cf.* Young v. Dille, 127 Wash. 398, 220 P. 782 (1923).

tortfeasors and prohibit joint and several liability for the aggravation of injuries as not coming within the exception stated in subsection 401(1)(a).

RCW 4.22.015 of the prior and current law provides a possible escape from this untoward result of the 1986 Act. The last paragraph of that section, which defines "fault," provides that a comparison of fault for any purpose under the provision of the prior law shall involve consideration of both the nature of the parties conduct and *the extent of the causal relation* between such conduct and the damages. If it is read to apply to the 1986 Act, it might permit addition of the subsequent tortfeasor's fault to the fault of the prior tortfeasor whose conduct created the occasion for the subsequent injury and thus increase the liability of the prior tortfeasor.

C. Miscellaneous Problems

Section 401(1)(b) poses other problems. The haphazard interchange of "person" and "party" has no apparent purpose, and the absence of the word "entity" is noticeable. Does this mean that only human beings are "persons" who may act as agents or servants of a party, with a consequence that there is no agency or respondeat superior liability for the acts of an "entity"? Is there a reason for distinguishing between responsibility for the fault of another person and responsibility for payment of the proportionate share of another party? Is it impossible to act in concert with an "entity"? The section obviously deserves re-drafting, and until it receives that re-drafting it will require considerable judicial construction.

Section 401(3) of the 1986 Act establishes three other exceptions from the rejection of joint and several liability. They are for: (1) any cause of action relating to hazardous wastes or substances or solid waste disposal sites; (2) a cause of action arising from the tortious interference with contracts or business relations; and (3) any cause of action arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.

Once again deficiencies of drafting are apparent. There is no indication given of the quantity of hazardous wastes or substances required to make the exception applicable. Does a small amount of a hazardous substance in a food product render the exception applicable to the grower, the food processor, the wholesaler, and the restaurant which served the food to the plaintiff? Does the exception apply only to wastes and substances at a waste disposal site? How large a quantity of waste must be accumulated to render the place a waste disposal site? Does the exception apply to wastes held temporarily at one place for transfer at a later date to another site?

Does the exception for tortious interference apply to all contracts, or only to commercial and business contracts? For example, does it apply to

an implied provision of confidentiality which arise in the contract between a physician and patient concerning treatment? If so, then there is joint and several liability for the physician, insurance investigator, insurance company, and counsel for the company if an overzealous investigator induces a breach of confidentiality. Does it apply to inducing a breach of an employment contract on a ground which violates public policy?[74]

The exception concerning fungible products in a generic form was apparently made for cases such as those involving the drug known as DES[75] and the use of asbestos.[76] Of course, a substantial cause of the problem of proof encountered by plaintiffs in the DES cases was the failure of dispensing pharmacists to maintain accurate records concerning the source of the drugs used, and some of the drugs were marketed under trade names. Prefabricated asbestos products frequently bear a trade name or mark. The exception is, therefore, not well drafted for the problem it addressed and may well fail to serve its intended purpose with other drugs marketed with identifying marks but dispensed by pharmacists as was DES. The exception could also apply to other fungible products, such as nails, screws, bolts, grain, and lumber.

The creation of these three exceptions will almost certainly be used to attack the constitutionality of section 401 as a deprivation of equal protection of the law under both the United States and the Washington Constitutions. Discussions in the Senate of comparable exceptions made by an earlier draft indicate that the first exception was based upon a concern that several liability alone would not provide sufficient incentives for large businesses to participate in the state superfund for cleaning up waste depositories.[77] The exception for interference with contracts and business relations was explained as relating to business torts, outside the area of personal injury, and hence outside the area of concern about the availability and affordability of casualty insurance.[78] The exception for fungible products marketed in a generic form was explained, as its language suggests, as an acceptance of the Washington Supreme Court's solution to the problems caused by DES and the necessity of its enactment if such injuries were to be

74. *Cf.* Cagle v. Burns & Roe, Inc., 106 Wn. 2d 911, 726 P.2d 434 (1986); Thompson v. St. Regis Paper Co., 102 Wn. 2d 219, 685 P.2d 1081 (1984).

75. Mink v. University of Chicago, 460 F. Supp. 713 (N.D. Ill. 1978); Martin v. Abbott Laboratories, 102 Wn. 2d 581, 689 P.2d 368 (1984); Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

76. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973); Hardy v. Johns-Manville Corp., 509 F. Supp. 1353, 1358–59 (E.D. Tex. 1980).

77. WASHINGTON STATE SENATE, SENATE JOURNAL (March 10, 1986) 27–28 (remarks of Sen. Talmadge).

78. *Id.* at 28–29 (remarks of Sens. Talmadge, Bottiger, and Thompson).

compensated.[79] The actual language of the exceptions appeared in the "coalition bill" which was substituted in the House for the text of the Senate bill and ultimately became the 1986 Tort Reform Act.[80] Those exceptions were not discussed in the House following the substitution. The legislative history thus provides something of a rationale for adoption of the exceptions, but it is far from comprehensive in its explanation of why joint and several liability should be preserved in its entirety only for the three stated types of lawsuits. Despite the weakness of the support for the exceptions, an equal protection attack upon them is unlikely to succeed unless they are subjected to close scrutiny.[81] However, even if a successful equal protection attack is made, the result is more likely to be an invalidation of the exceptions than an invalidation of section 401.[82]

D. The Effect on Negotiated Settlements

Section 401 will predictably have unanticipated and undesireable effects upon the negotiation of settlements in tort cases. Section 401(1) requires allocating fault to parties who have been released by the plaintiff and provides for entering judgment against an individual defendant for only that defendant's share of the plaintiff's total damages (unless, as will be discussed, the plaintiff was free from fault). A consequence is that a settlement may produce a greater reduction in a defendant's liability than the amount paid, and thus a greater reduction in a plaintiff's total recovery, than was the case under the prior law. Under the prior law, the reduction in the liability of other tortfeasors, and hence in the remainder to be recovered by a plaintiff, was only the amount paid in settlement if that amount was reasonable at the time of settlement.[83] In determining what was a reasonable settlement, it was permissible to consider the financial capacity of the released party to pay, expectable expenses of litigation, and the then perceived merits of the claim and defenses.[84] That amount could be

79. *Id.* at 29–30 (remarks of Sens. Talmadge and Thompson).

80. WASHINGTON STATE HOUSE OF REPRESENTATIVES, HOUSE JOURNAL (March 6, 1986) 1056–58.

81. *See* Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 38 OKLA. L. REV. 195, 202–10 (1985), *reprinted in* 35 DEF. L.J. 359, 367–77 (1986). The recent decision of the Supreme Court of California in Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, *appeal dismissed*, 106 S. Ct. 214 (1985), sustaining the constitutionality of a $250,000 limitation on non-economic losses in medical malpractice cases in response to a perceived insurance crisis, suggests the acceptability of that rationale for the law and, similarly, its absence as the reason for recognizing exceptions from a law limiting liabilities.

82. Buckley v. Valeo, 424 U.S. 1, 108–09 (1976); United States v. Jackson, 390 U.S. 570 (1968); Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210 (1932). *But cf.* Carter v. Carter Coal Co., 298 U.S. 238 (1936).

83. Glover v. Tacoma Gen. Hosp., 98 Wn. 2d 708, 658 P.2d 1230 (1983).

84. *Id.*

considerably less than the settling defendant's proportionate share of plaintiff's total damages established after trial. Plaintiffs now will be reluctant to enter into settlements until a determination is made of the shares of fault allocable to all potential defendants and they will resist recognizing other factors which previously made a lesser sum acceptable. Litigation will therefore frequently involve more parties and continue over a longer period of time than under the former law.

This result is ensured by section 401(1)(b) which recognizes and preserves a joint and several liability in cases in which the plaintiff is without fault. That joint and several liability is limited to the sum of the proportionate shares of the defendants against whom a judgment is entered. Accordingly, a plaintiff without fault will have incentive to involve and keep as a defendant every party against whom a judgment can be entered and to do so regardless of whether that party will be able to pay the judgment. The party's limited financial resources will not make acceptable a settlement at the limit of ability to respond because it will reduce the amount which will be recoverable from the financially responsible jointly liable defendants. Settlements in such cases will be less frequent and considerably more complicated because of the number of parties than they used to be.

Target, or deep pocket, defendants will also have an incentive to hold out until a judgment has been rendered. Attributing any fault to the plaintiff in a judgment will eliminate the possibility of joint and several liability and limit that defendant's liability to its proportionate share of the total fault. It will also eliminate any possibility of contribution between tortfeasors. It seems likely that financially responsible, or target, defendants will negotiate with stiffened resolve to limit their liability to a share until a judgment has established a plaintiff's freedom from fault. They will be unwilling to accept liability for a plaintiff's total harm on the chance of obtaining reimbursement later in a suit for contribution.

This unwillingness will be based in part on the fact that section 401(1)(b) states, "If the trier of fact determines that the claimant . . . was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable . . . ." This strongly suggests that joint and several liability exists only after the entry of judgment. Section 401(2) reinforces this reading by providing a right of contribution only for parties who are jointly and severally liable under section 401(1), and that section makes it clear that a judgment is to be entered only against parties who are defendants and not defendants or entities released by a claimant. Section 401(2) of the 1986 Act does provide that a defendant's right to contribution shall be determined under the law which governed contribution between tortfeasors prior to enactment of the 1986 statute. It would, however, be a tortured reading of that section to conclude that a party is jointly and

severally liable if an action might have been, even though it has not been, pursued to judgment.

There is also a problem concerning the effect a settlement at an amount which exceeds that proportion of a plaintiff's total damages allocated to the settling party has in a subsequent lawsuit. The law prior to enactment of the 1986 statute[85] provided that the claim of a releasing person against other persons was reduced by the amount paid pursuant to a reasonable settlement agreement. That will probably continue to be the result with respect to judgments entered for joint and several liability when plaintiffs are free from fault because the prior law is expressly made applicable by the 1986 statute in such cases. But will it have that effect with respect to defendants who have only a several liability? Section 401(1) of the 1986 Act expressly provides that the judgment shall be entered against each defendant ". . . in an amount which represents that party's proportionate share of the claimant's total damages." It does not make provision for reducing the claimant's total damages by any amounts previously received in settlements. The language is thus susceptible of a reading that a plaintiff who receives an excessive settlement from a released entity may keep that windfall and need not give the remaining tortfeasors any credit for the excess.

Finally, it should be noted that section 403 of the 1986 Act amended the provisions of the workers compensation statute which give the Department of Labor and Industries and self-insurers a lien upon the recovery of an injured worker in a third-party tort suit. Section 403 added to RCW 51.24.060 a new subsection (f),[86] which provides that if the employer or a co-employee are determined to have been at fault, the Department or self-insurer loses its lien on the third-party tort claim recovery. The loss of the lien is not made proportional to the fault of the employer or co-employee but instead provides that attribution of any fault to them is sufficient to destroy the lien in its entirety. The worker then enjoys full worker's compensation benefits. Those benefits may not be as much as the reduction of the third-party recovery worked by allocation of fault to the employer, but their receipt will ameliorate the loss which would otherwise occur.

The new subsection (f) is made applicable by its terms, "If the employer or a co-employee are determined under section 401 of this 1986 Act to be at fault." As written, the section appears to require a judicial determination that the employer or co-employee was at fault and thus precludes eliminating the Department's lien by a settlement between the employee and the

85. WASH. REV. CODE § 4.22.060(2) (1986).

86. The new subsection reads as follows:

(f) If the employer or a co-employee are determined under section 401 of this 1986 act to be at fault, (c) and (e) of this subsection do not apply and benefits shall be paid by the department and/or self-insurer to or on behalf of the worker or beneficiary as though no recovery had been made from a third person.

third-party defendant. The prior workers' compensation law requires an injured worker to give notice to the Department (or self-insurer) that he has elected to seek damages from a third person[87] and it also provides that a compromise or settlement for less than the amount of compensation benefits is void unless made with the written approval of the Department or self-insurer.[88] However, nothing in the 1986 statute requires the third-party defendant or the plaintiff to give notice that the employer has been identified as an "entity" to which fault should be assigned in the litigation, nor is there any provision made for participation in the litigation by the Department or self-insurer. To the contrary, the existing workers' compensation law specifically prohibits pleadings or evidence that the plaintiff in a third-party tort suit is entitled to compensation under the law.[89] It therefore appears that the Department or self-insurer may be deprived of its lien without opportunity to contest the propriety of allocation of fault to the employer. The loss of the lien will adversely affect the employer's experience rating,[90] resulting in a higher premium than would otherwise be applicable. Such a substantial loss without notice and opportunity to participate by the Department as an employer's representative or a self-insurer certainly offends the concept of due process of law. The possibilities for collusion between the injured employee and the third-party defendant are too obvious to be ignored, but they will exist until the statute is changed.

The workers' compensation law permits the Department or a self-insurer to institute suit against a third-party tortfeasor if the injured employee elects not to proceed against that party.[91] The 1986 statute inexplicably fails to make provision for loss of the lien in such suits if fault is attributed to the employer or a co-employee. An incentive has thus been provided for injured employees to litigate rather than permit the Department to negotiate a settlement.

IV. CONCLUSION

The section of the 1986 Tort Reform Act which rejects and modifies the common law rule of joint and several liability is not a well drafted provision. Even if its apparent objectives are accepted as sound public policy, the statutory language will cause avoidable litigation and unnecessarily complicate the process by which tort claims have been settled in the past.

87. WASH. REV. CODE § 51.24.080 (1985).
88. *Id.* § 51.24.090.
89. *Id.* § 51.24.100.
90. WASH. ADMIN. CODE § 296-17-850 (1983).
91. WASH. REV. CODE § 51.24.050 (1985).

The changes made include abrupt reversals of policies carefully developed in past years by both the legislature and the courts, and this creates an impression that the legislature gave its approval to the new statutory language without fully understanding the consequences of that approval.

It is a grave and serious matter to permit the reduction of an injured person's claim for compensation from one who caused the injuries by allocating fault to unidentified and unreachable entities, and, if that had been the legislative purpose, one would have hoped it had been done in language more clearly affirming that purpose. The statute produces an abrupt reversal of a legislative policy prohibiting imputing negligence between spouses and between parents and children, and again one might have hoped for a clearer statement of that purpose if that were the legislative purpose. One might have hoped that a statute permitting such consequences would have carefully fashioned protective procedures for making such allocations, but none appear in the statute. Considering the importance of the concept of an "entity" to which fault may be allocated, one might have hoped for a definition of that term, but none was given.

The waiver of sovereign immunity and the adoption of comparative negligence did create problems for "deep pocket" defendants, such as municipalities and counties. But those problems could have been dealt with, as they were in other states, in much less draconian ways. Arguments made for comparative negligence, advanced to enhance the compensatory function of tort law, have now produced a situation in which plaintiffs free from fault are in a worse position that they would have been under the harsh rule that contributory negligence was a complete bar to recovery. A person subjected to successive injuries by the wrongdoing of a first tortfeasor will apparently have to join all wrongdoers and litigate each claim against each wrongdoer in order to obtain a full recovery of damages.

An almost certainly uncontemplated consequence of the 1986 Act is that it will significantly complicate the process of settling tort claims and thereby increase the expense of litigation. The inefficiencies of the tort system for compensating injured persons are derived largely from the expenses of litigation, and an increase in those expenses will be reflected in increased insurance premiums, the reduction of which was a major purpose of the Act. Avoiding this untoward event in negotiating settlements of cases is alone sufficient reason for prompt legislative reconsideration of the statute. At the same time, consideration should also be given to whether the policy objectives of the 1986 Tort Reform Act should be pursued in such a single-minded manner.

[In a subsequent issue of the Washington Law Review Professor Peck will discuss constitutional challenges to the 1986 revisions of the rule of joint and several liability of tortfeasors.]